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Ethics: A Prosecutor's Guide to Judicial Misconduct

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Ethics: A Prosecutor's Guide to Judicial Misconduct

A. Every Attorney should have a working knowledge of the Code of Judicial Conduct.

1. Rule 8.3 (b) of the Arizona Rules of Professional Conduct indicates that a lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority. (However, information must not be privileged, see 8.3 C).
2. Rule 8.4(f) of the Arizona Rules of Professional Conduct indicates that it is professional misconduct for a lawyer to knowingly assist a judge in conduct that is a violation of applicable code of judicial conduct or other law.
3. An independent judiciary is one of the three legs of our tripartite system of government. The continued existence of an independent judiciary depends upon the people's faith in the institutions they create. Thus our constitution grants this court the power to discipline a judge for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute. *Matter of Goodfarb*, 880 P.2d 620, 179 Ariz. 400 (Ariz. 1994).
4. Arizona regulates judicial conduct through a system involving the Arizona Supreme Court and the constitutionally-created Commission. See Ariz. Const. art. 6.1; R. Comm'n Judicial Conduct. The Commission performs "a central and essential role in imposing appropriate judicial discipline. On recommendation of the commission," this Court "may censure, suspend without pay or remove a judge for ... willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance or conduct prejudicial to the administration of justice." Ariz. Const. art. 6.1, § 4(A). The Constitution does not itself specify procedural rules for judicial disciplinary proceedings, but instead directs this Court to make rules implementing the constitutional provisions. *Carroll v. Commission on Judicial Conduct*, 160 P.3d 1140, 215 Ariz. 382 (Ariz. 2007).
5. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do

so freely and willingly. *Matter of Fleischman*, 933 P.2d 563, 188 Ariz. 106 (Ariz. 1997).

6. Any grievance a lawyer may have concerning ethical misconduct by a sitting judge should be submitted to the Commission on Judicial Qualifications. "Going public" by a member of the Bar is not the appropriate method to redress misconduct by a judge. *Matter of Riley*, 691 P.2d 695, 142 Ariz. 604 (Ariz. 1984)
7. Judicial discipline protects the public and the integrity of the judicial process and is a balancing of the need for an independent judiciary with the necessity for removal of those who do not measure up to the high standards required of a person holding judicial office. *Matter of Haddad*, 627 P.2d 221, 128 Ariz. 490 (Ariz. 1981)
8. An admonition is a private communication reminding a judge of ethical responsibilities and giving a gentle or friendly warning to avoid future misconduct or inappropriate practices. An admonition may be used to give authoritative advice and encouragement or to express disapproval of behavior that suggests the appearance of impropriety even though it meets minimum standards of judicial conduct.
9. A reprimand is a private communication that declares a judge's conduct unacceptable under one of the grounds for judicial discipline but not so serious as to merit a public sanction." Commission on Judicial Conduct, "Definitions of Sanctions," *supra*. See also Rule 4(f)(1), Commission on Judicial Conduct, Rules of Procedure.
10. The Arizona Supreme Court is responsible for protecting the public from those who are unfit to serve. We believe that Arizona is entitled to the best possible judges it can get and keep, and that the public should and does demand and expect much of their judges in view of the vast power granted to them. *In re Jett*, 882 P.2d 414, 180 Ariz. 103 (Ariz. 1994).
11. [T]his court's primary obligation in administering bar discipline is protecting the public rather than analyzing the reasons for the lawyer's delinquency. "Our primary concern must be the fulfillment of proper professional standards, whatever the unfortunate cause, emotional or otherwise, for the attorney's failure to do so." *Id.*

12. Because "[a]n independent and honorable judiciary is indispensable to justice in our society, Canon 1 directs judges to 'observe high standards of conduct' so that the integrity and independence of the judiciary may be preserved." *In re Lorona*, 875 P.2d 795, 178 Ariz. 562 (Ariz. 1994).

13. Judges are not unique in the realm of public officeholders. The record books regretfully show that some have been dishonest, incompetent, and prejudiced. *Matter of Riley*, 691 P.2d 695, 142 Ariz. 604 (Ariz. 1984)

1. **Canon 1. A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.**
2. Rule 1.2. Promoting Confidence in the Judiciary: A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
3. Comment 3 to Rule 1.2: Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the rule is necessarily cast in general terms.
4. Comment 5 to Rule 1.2: Actual improprieties include violations of law, court rules, or provisions of this code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. An appearance of impropriety does not exist merely because a judge has previously rendered a decision on a similar issue, has a general opinion about a legal matter that relates to the case before him or her, or may have personal views that are not in harmony with the views or objectives of either party. A judge's personal and family circumstances are generally not appropriate considerations on which to presume an appearance of impropriety.

5. Rule 1.3. Avoiding Abuse of the Prestige of Judicial Office: A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.
6. Comment [1] It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. ***
7. **Canon 2. A judge shall perform the duties of judicial office impartially, competently, and diligently.**
8. Rule 2.2. Impartiality and Fairness: A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.
9. Rule 2.3: Bias, prejudice and harassment:
 - a. A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
 - b. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
 - c. A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.
 - d. The restrictions of divisions (B) and (C) of this rule do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

10.Rule 2.6, Insuring the Right to Be Heard:

- A. A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.
- B. (B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

11.Rule 2.8. Decorum, Demeanor, and Communication with Jurors

- a. A judge shall require order and decorum in proceedings before the court.
- b. A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

12.Rule 2.9. Ex Parte Contacts and Communications with Others.

- a. A judge shall not initiate, receive, permit, or consider ex parte communications, except as follows:
- b. (1) When circumstances require it, an ex parte communication for scheduling, administrative, or emergency purposes, that does not address substantive matters or issues on the merits, is permitted, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;
- c. (2) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives notice to the parties of the person consulted and the subject-matter of the advice solicited, and affords the parties a reasonable opportunity to object or respond to the advice received;
- d. (3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record and does not abrogate the responsibility personally to decide the matter. ***

- e. B) If a judge receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond. The judge may not abrogate the responsibility personally to decide the matter.

13. Rule 2.11. Disqualification (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.***

14. Rule 2.16. Cooperation with Disciplinary Authorities (A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies. (B) A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

15. Canon 3. A judge shall conduct the judge's extrajudicial activities so as to minimize the risk of conflict with the obligations of judicial office.

16. Rule 3.1. Extrajudicial Activities in General: A judge may engage in extrajudicial activities, except as prohibited by law. However, when engaging in extrajudicial activities, a judge shall not do any of the following: (A) Participate in activities that will interfere with the proper performance of the judge's judicial duties; ***

17. Canon 4. A judge or judicial candidate shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary

- a. A judge or judicial candidate shall not do any of the following:
 - (1) Act as a leader of, or hold an office in, a political party;
 - (2) Make speeches on behalf of a political party or another candidate for public office;
 - (3) Publicly endorse or oppose a candidate for another public office; ***

C. The Arizona Supreme Court has sanctioned judges for violating the Code of Judicial Conduct.

1. ***Matter of Goodfarb, 880 P.2d 620, 179 Ariz. 400 (Ariz. 1994)*** Count I alleged that in the case of *State v. Joseph*, 1 CA-CR 92-1379-PR, the Arizona Court of Appeals filed a memorandum decision in which it found that Judge Goodfarb had used racially insensitive words in connection with a hearing on a Batson issue on a petition for post-conviction relief. Count II alleged that, notwithstanding a prior admonition and a prior reprimand from the Commission, Judge Goodfarb used profane expressions in the case of *Long v. Dayton-Hudson Corp.*, CV 93-24269.

A. Judicial Commission concluded that Judge Goodfarb's use of racial epithets in the course of conducting judicial business violated Canons 1, 2A and 3A of the Code of Judicial Conduct, Rule 81, Ariz.R.S.Ct., effective February 1, 1985, and constituted conduct prejudicial to the administration of justice that brought the judicial office into disrepute within the meaning of art. 6.1, § 4 of the Arizona Constitution.

B. As to count II, the Commission found that Judge Goodfarb's use of profanity during the course of official judicial business violated Canons 1, 2A, and 3B of the Code of Judicial Conduct.

C. Arizona Supreme Court found that Judge had violated these Canons. Judge indicated that he was not going to seek reelection. Therefore Court suspended him for remainder of term.

D. Court rejected the Judge's argument for censure noting that "many citizens have lost faith in Judge Goodfarb's judgment because he used racially inflammatory language in an official court proceeding and because of his chronic use of profanity in official proceedings."

E. In a concurring opinion, Justice Corcorran noted that it took four years for judicial misconduct to come before court. "The only way to assure that the public's interests are being served is by fulfilling our responsibility for self-regulation. We are charged with the responsibility for regulating ourselves and we, lawyers and judges, must act in a timely fashion."

2. ***Matter of Hendrix, 701 P.2d 841, 145 Ariz. 345 (Ariz. 1985)*** Court alleged that Judge Hendrix' conduct violates Canons 1, 2, and 3 of the Code of Judicial Conduct relating to independence of the Judiciary, Appearance of Impropriety, and Performing the Duties of her office Impartially and

Diligently. The Judge's clerk was helping inmate with post-conviction relief petition and had judge signed ex parte order granting clerk special privileges to visit inmate and granting inmate special phone privileges.

A. From a review of the record in this case, we agree with the commission that the conduct of Judge Hendrix violated the Canons of Judicial Conduct, Rule 81, Rules of the Supreme Court, and particularly Paragraph B of Canon 2 which proscribes conduct that lends the prestige of the judicial office to the private interest of others or conveys to the public that others are in a special position to influence the judge. The actions of Judge Hendrix did just that. Her clerk was given special privileges not accorded to others. She obtained these privileges and favors only because she had access to the judge--access not available to other non-lawyers. This conduct did not "promote public confidence in the integrity and impartiality of the judiciary" as required by Canon 2.

B. The Judge was given a public censure.

3. **In re Flournoy, 990 P.2d 642, 195 Ariz. 441 (Ariz. 1999)** Judge Flournoy was the trial judge in a civil case and had a defendant in a criminal case as a potential juror. The judge had the attorneys question the potential juror in chambers and he was dismissed. After the potential juror left the chambers the judge explained to the attorneys the potential juror was on probation and that he was a gunman and a threat to the judge. The Court reporter recorded this conversation and when the defendant's attorney sought to have a transcript of the in chambers conversation the judge told the court reporter to delete the conversation about the defendant. The court reporter reluctantly followed the court's order.

A. The Court affirmed Judicial Commission finding that Court Reporter is a credible witness on this issue and Judge Flournoy is not." Consequently, it found Judge Flournoy's "instruction to his court reporter to not transcribe a portion of the jury selection proceedings in chambers constituted tampering with official court proceedings" in violation of Canons 1A and 2A of the Code. The Commission concluded that this conduct constituted willful misconduct in office in violation of article 6.1, section 4 of the Arizona Constitution.

B. On another count, Court and Commission found that Judge Flournoy's "repeated outbursts of temper, in which he shouted at attorneys and litigants, belittled attorneys in the presence of their clients, and gestured in a threatening manner exceeds [sic] behavior that might normally be tolerated or expected of a judge who regularly handles difficult cases violated Canons 1A, 2A, 3B(3), and 3B(4) of the Code of Judicial Conduct, Rule 81, Ariz. R. Sup.Ct., and constituted conduct prejudicial to the administration of justice within the meaning of article 6.1, section 4 of the Arizona Constitution.

C. On another count Court and Commission found that Judge Flournoy's "conduct in shouting and pointing his finger at the elected clerk of the superior court, while standing over her and making derogatory and cruel comments, claiming that she did not know what she was doing and threatening to throw her in jail," violated Canons 1A, 2A, and 3B(4) of the Code and was prejudicial to the administration of justice in violation of article 6.1, section 4 of the Arizona Constitution.

D. Judge Flournoy had a total of six prior disciplinary cases on his record which began a mere year after he joined the bench.

E. Court suspended judge for 18 months.

4. **Matter of Koch, 890 P.2d 1137, 181 Ariz. 352 (Ariz. 1995)** Judge approached a woman on the corner and motioned her to his truck by tilting his head from side to side. They exchanged greetings, and the woman asked Judge Koch what he was looking for. He replied "How about some head?" The woman asked how much he had to spend, and he replied that he had twenty dollars. The woman was an undercover Phoenix police officer participating in a "customer apprehension program." She recorded the conversation. Judge Koch was arrested and charged with solicitation of prostitution under Phoenix City Code § 23-52(a)(2), a class one misdemeanor. Judge Koch claimed that he stopped at the corner merely to test his brakes. He was convicted in the Phoenix Municipal Court the day after oral argument in this case.

A. Judge also had 3 separate disciplinary actions for assaulting three different people including his girlfriend. Commission concluded that

Judge Koch's behavior violated Canons 2A and 4A of the Code of Judicial Conduct, and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of article 6.1, § 4 of the Arizona Constitution.

- B. Court found that solicitation conviction violated Canons 1, 2A, 4A(1) and 4A(2) of the Code of Judicial Conduct, Rule 81, Ariz.R.Sup.Ct., was a crime of moral turpitude, and amounted to "willful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" within the meaning of article 6.1, § 4 of the Arizona Constitution.
 - C. Arizona Supreme Court authorized by the Arizona Constitution to discipline a judge for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute.
 - D. "Judges cannot uphold and support the laws while committing the very crimes for which they sentence others." Court ordered judge removed from office.
5. **In re Jett, 882 P.2d 414, 180 Ariz. 103 (Ariz. 1994)** Magistrate had drunk boyfriend arrested on DV after he had been verbally abusive and then signed the release order in her capacity as a judge, and boyfriend was released, without bond, on his signature, several hours before the scheduled arraignment time. She then self-reported her misconduct. The magistrate had 4 prior judicial violations.
- A. The Commission found and Court agreed that Respondent violated Canons 1, 2(A), 2(B), and 3(E) of the Code of Judicial Conduct.
 - B. "Using the power of her judicial office for purely personal reasons is grossly improper. Such misuse of public office destroys public confidence in the integrity and impartiality of the judiciary, and shows that Respondent's personal relationships have influenced her judicial conduct."
 - C. The Court suspended judge for four years, the remainder of her term finding that her conduct was willful.